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Supreme Court, U.S.
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In The

Supreme Court of the United States

FLORA HOLLAND, WARDEN,

Petitioner,

v.

FRANK E. ADAMS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the decision of the court of appeals, holding that Tennessee Supreme Court Rule 39 makes a petition for discretionary review to the supreme court unavailable as a state remedy for exhaustion purposes under 28 U.S.C. § 2254, contrary to this Court's decision in *O'Sullivan v. Boerckel*, when the rule does not remove such a remedy as an option in Tennessee's established appellate review process?

2. Assuming that Tennessee Supreme Court Rule 39, adopted in 2001, eliminates discretionary review as an "available" state remedy, is the decision of the court of appeals, applying the rule retroactively to remove Adams' 1993 procedural default for failure to raise his claim in such a petition, contrary to this Court's decision in *O'Sullivan v. Boerckel*?

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. No party to this petition is a non-governmental corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General and Reporter of the State of Tennessee, on behalf of Flora Holland, Warden, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is published at 330 F.3d 398. The memorandum opinion of the district court relevant to Adams' confrontation-rights claim (App. 23) is unreported.

JURISDICTION

The judgment and opinion of the court of appeals were entered on May 20, 2003. (App. 1) Petitioner's timely request for rehearing was denied on August 27, 2003. (App. 66) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved in this case is 28 U.S.C. § 2254, the pertinent portions of which are reproduced in the appendix. (App. 67)

STATEMENT OF THE CASE

I. Procedural History

Respondent Frank E. Adams ("respondent" or "Adams") was convicted by a jury in 1991 in the Criminal Court of Davidson County, Tennessee, of murder in the first degree (in the perpetration of a felony), Tenn. Code Ann. § 39-2-202 (1982) (repealed), and two counts of armed robbery, Tenn. Code Ann. § 39-2-501 (1982) (repealed). The trial judge sentenced respondent to consecutive terms of imprisonment – life on the murder count and ten years for each robbery, for a total effective sentence of life plus twenty years. The Tennessee Court of Criminal Appeals affirmed the judgment, *State v. Adams*, 859 S.W.2d 359 (Tenn. Crim. App. 1992), and the Tennessee Supreme Court denied Adams' application for permission to appeal on June 28, 1993. (J.A.[1] 87)

Adams subsequently filed a petition for post-conviction relief. The trial court's judgment denying relief was affirmed, and Adams' application for permission to appeal was denied by the Tennessee Supreme Court. *Adams v. State*, No. 01C01-9609-CR-00401, 1997 WL 803585 (Tenn. Crim. App. Dec. 30, 1997) (app. denied June 8, 1998). (J.A. 89-92)

On June 14, 1999, Adams filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Tennessee. By order and memorandum entered October 19, 2000, the district court granted the

[1] "J.A." designates the joint appendix filed by the parties in the court of appeals.

warden's motion to dismiss and motion for summary judgment, denied the petition for a writ of habeas corpus, and dismissed the case. (App. 18, 23) The district court also denied a certificate of appealability. (*Id.*)

Adams requested a certificate of appealability from the United States Court of Appeals for the Sixth Circuit. The chief judge denied the request. (App. 63) However, a three-judge panel granted Adams' petition to rehear, vacated the order, and granted a certificate of appealability on two issues. (App. 64)

In an opinion filed April 4, 2003, another three-judge panel affirmed the district court's judgment. (App. 49) Adams filed a petition for rehearing, with a suggestion for rehearing en banc. On May 20, 2003, during the pendency of Adams' petition, the panel issued an "amended" opinion and judgment, this time vacating the district court's judgment and remanding the case for further proceedings consistent with the opinion. (App. 1) Adams promptly withdrew his petition for rehearing. The warden subsequently filed a petition for rehearing, with a suggestion for rehearing en banc, but the petition was denied on August 27, 2003. (App. 66)

II. Facts Relevant to the Petition

1. Adams and Timothy Allen Crowell were indicted jointly for three crimes committed during the early morning hours of February 5, 1989: the armed robbery of Kurt Zimmerman, a clerk at a Nashville convenience store, and the subsequent armed robbery and murder of Thomas Weser, an exchange student at a local university. Crowell's case was severed, and Adams was tried first.

The proof at Adams' trial showed that at about 2:30 A.M. one of the two men robbed Zimmerman with a handgun. The other man remained outside as a "lookout" and "getaway car" driver. At about 3:50 A.M., one of the men robbed and killed Weser, taking his wallet, while the other remained outside in the car. On two separate occasions, Adams admitted being involved in the crimes, but he fingered Crowell as the shooter and described the vehicle they had used. *State v. Adams*, 859 S.W.2d at 361-62.

During the trial, the prosecution established through the testimony of Lisa Cantrell that Adams and Crowell were together shortly before and shortly after the killing. But on cross-examination Cantrell related a statement that she overheard Crowell make to another man immediately after a fight – that "he'd shot someone before and he could shoot him also" – evidence suggesting that Crowell, not Adams, may have shot Weser. To counter this testimony, the prosecution proposed the introduction of the testimony of Detective Mike Smith that Crowell had made a statement that Adams was the person who shot Weser. *Id.*, 859 S.W.2d at 363. Over defense objection, the trial judge ruled the testimony admissible under Rule 806, Tenn. R. Evid., which permits the impeachment of hearsay declarants to the same extent as trial witnesses. *Id.* The jury was instructed to consider the testimony only as it might affect the credibility of Crowell's statement related by Cantrell. The jury convicted Adams of the first-degree murder of Weser and the two armed robberies.

2. On direct appeal to the Court of Criminal Appeals, Adams alleged four errors by the trial court: the admission of his pretrial statements, the consolidation of the indictments for trial, the admission of Detective Smith's

testimony, and the imposition of consecutive sentences. (J.A. 50-71) With respect to Detective Smith's testimony, Adams complained that the admission of the evidence violated his federal and state constitutional rights to confront a witness against him and, alternatively, that the testimony should have been excluded under Rule 403, Tenn. R. Evid., which permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. (J.A. 65) Without specifically addressing the constitutional issue, the Court of Criminal Appeals upheld the admission of the testimony and, finding no reversible error in the record, affirmed the judgment. *State v. Adams*, 859 S.W.2d at 363, 364.

Adams filed an application for permission to appeal in the Tennessee Supreme Court, as permitted by Tenn. R. App. P. 11, but he abandoned any claim of error in the admission of Detective Smith's testimony and raised only an issue as to whether the consolidation of the indictments was harmless error. (J.A. 74-85) The Supreme Court denied the application. (J.A. 87)

3. In his federal habeas corpus case, Adams asserted, *inter alia*, that "[his] confrontation clause rights and his rights to due process were violated by the admission of a statement of his co-defendant, and this constitutional violation was not harmless." (J.A. 228) The warden moved for dismissal of the petition and for summary judgment. Specifically, as to the confrontation-rights claim, the warden requested dismissal because the claim was not presented to the Tennessee Supreme Court for review and, therefore, procedurally defaulted. (R. 28: Memorandum of Law in Support of Respondent's Amended Motion to Dismiss and for Summary Judgment at 8) Adams responded, conceding that the claim was procedurally

defaulted but contending that the default should be excused because appellate counsel rendered ineffective assistance of counsel in his representation before the Supreme Court. (R. 29: Reply to Government's Amended Motion to Dismiss and for Summary Judgment at 16)

The district court granted the warden's motion to dismiss and for summary judgment as to all claims and denied a certificate of appealability. (App. 18, 23) With respect to the confrontation-rights claim in particular, the district court concluded that, as acknowledged by Adams, the claim was procedurally defaulted and that, contrary to Adams' contention, the default was not excused by appellate counsel's alleged ineffective assistance because that claim likewise had been procedurally defaulted. (App. 41-42) Adams applied to the court of appeals for a certificate of appealability, but the application was denied by Chief Judge Martin. (App. 63) Adams filed a petition for rehearing, with a suggestion for rehearing en banc.

While Adams' petition was pending, on June 28, 2001, the Tennessee Supreme Court adopted Rule 39, Rules of the Supreme Court, providing, in part, as follows:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted

> all available state remedies available for that claim.

(App. 68-69) Adams filed a supplemental pleading in support of rehearing, noting the rule and contending that, under the rule, the claims found procedurally defaulted by the district court for failure to present them to the Tennessee Supreme Court were not procedurally defaulted. A three-judge panel of the court of appeals (Norris, Moore, and Cole, JJ.) granted rehearing, vacated the chief judge's prior order denying a certificate of appealability, and granted Adams a certificate of appealability on (1) whether, in light of Rule 39, Adams procedurally defaulted his confrontation-rights claim and (2) if not, whether the admission of the evidence violated Adams' right of confrontation. (App. 64)

After briefing and argument before another panel (Boggs, J., Cole, J., and Battani, J. (District Judge, sitting by designation)), the court of appeals affirmed the district court's judgment. (App. 49) The panel concluded that, while Rule 39 rendered Tennessee Supreme Court review "unavailable" for purposes of the exhaustion requirement for federal habeas corpus petitioners (App. 53-58), the rule did not operate retroactively to prevent the procedural default by Adams in this case. (App. 58-61)

Adams filed a petition for rehearing, with a suggestion for rehearing en banc. Upon consideration of the petition, the same panel issued an "amended" opinion and judgment, this time vacating the judgment of the district court denying habeas relief on procedural default grounds and remanding the case for further proceedings consistent with the opinion. (App. 1) This time the panel concluded

that Rule 39 *did* operate retroactively to prevent the procedural default by Adams in this case. (App. 10-14)

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals conflicts with this Court's decision in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). Despite Adams' failure to present his confrontation-rights claim to the Tennessee Supreme Court in 1993 in an application for permission to appeal – a normal, established part of Tennessee's appellate review process – the Sixth Circuit held that, eight years *after* Adams' default, the Tennessee Supreme Court's adoption of a rule, purporting to make an application for permission to appeal unnecessary for exhaustion purposes, erased the procedural default. But the rule did not, in fact, remove an application for permission to appeal from the arsenal of options available to defendants. This anomalous result is plainly inconsistent with *Boerckel*'s holding that a petition for discretionary review is necessary for exhaustion. Furthermore, the court of appeals' retroactive application of the Tennessee rule grafts a qualification on *Boerckel*'s holding never contemplated by this Court when it decided the case and is patently contrary to the reasoning of that decision.

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *O'SULLIVAN V. BOERCKEL*, WHICH REQUIRES EXHAUSTION OF STATE REMEDIES THROUGH A PETITION FOR DISCRETIONARY REVIEW TO THE HIGHEST STATE COURT WHEN SUCH A PETITION IS AN ESTABLISHED PART OF THE STATE'S APPELLATE REVIEW PROCESS.

In *Boerckel*, this Court addressed the issue of "whether a state prisoner must present his claims to a state supreme court in a petition for discretionary review in order to satisfy the exhaustion requirement" of 28 U.S.C. § 2254(c) (App. 67) "when that court has discretionary control over its docket." 526 U.S. at 839-40, 843. In his federal habeas corpus petition, Boerckel had presented several claims that had been presented to the Illinois intermediate appellate court but not in his application for leave to appeal to the Illinois Supreme Court, *id.* at 840-41, 843, which, under Illinois law, could have granted review as "a matter of sound judicial discretion." *Id.* at 843 (quoting Ill. Sup. Ct. R. 315(a) (1998)).

This Court began its analysis by examining the relevant statutory language of the exhaustion requirement: "Section 2254(c) provides that a habeas petitioner 'shall not be deemed to have exhausted the remedies available in the court of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.'" 526 U.S. at 844 (omission in original). Interpreting "available procedure" to mean the State's "established, normal appellate review process," *id.* at 845, the Court held that a prisoner properly exhausts his claims when he resorts to the normal

measures that constitute "one complete round of the State's established appellate review process." *Id.* The Court concluded that a petition for discretionary review to the Illinois Supreme Court was an "established part of the State's appellate review process." *Id.*

When Adams challenged his convictions on direct appeal in the state courts in 1993, and at all times thereafter, Tennessee's established appellate review process was virtually identical to the Illinois procedure at issue in *Boerckel*: an appeal *as of right* to the Court of Criminal Appeals, with an appeal *by permission* to the Tennessee Supreme Court. *See* Rules 3 and 11, Tenn. R. App. P. Indeed, Tennessee's rule on discretionary review, much like the Illinois rule, provides that an appeal may be taken from an intermediate appellate court to the Tennessee Supreme Court "only on application and in the discretion of the Supreme Court." Rule 11(a), Tenn. R. App. P. The rule also closely resembles the Illinois rule in elaborating on the exercise of this discretion:

> In determining whether to grant permission to appeal, the following, while neither controlling, nor fully measuring the court's discretion, indicate the character of the reasons that will be considered: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority.

Id. Just as Boerckel winnowed his claims, Adams presented his confrontation-rights claim to the intermediate appellate court (J.A. 64-68), but abandoned it when he petitioned the state supreme court for review. (J.A. 74-85) Thus, like Boerckel, Adams plainly failed to exhaust an available remedy.

Citing *Boerckel* (App. 27), the district court found that Adams' failure to present the confrontation-rights claim to the Tennessee Supreme Court constituted a procedural default of the claim. (App. 41-42) In light of the clear holding of *Boerckel* that, where a petition for discretionary review is an established part of a State's appellate review process and in light of the fact that a petition for discretionary review under Tennessee's appellate scheme – virtually indistinguishable from the Illinois scheme reviewed in *Boerckel* – constituted an established part of Tennessee's appellate review process in 1993, the district court's finding unquestionably was correct.

The Sixth Circuit's reversal of the district court's procedural default ruling is, therefore, remarkable. Seizing on language in *Boerckel* stating that "nothing in our decision today requires the exhaustion of any specific state remedy when a State has provided that the remedy is unavailable," 526 U.S. at 847, the court of appeals held that Tennessee Supreme Court Rule 39 (App. 68), adopted in 2001 and stating that a litigant "shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error," rendered discretionary review by the Tennessee Supreme Court unavailable.

But Rule 39 does not render discretionary review unavailable. Indeed, after adopting Rule 39, the Tennessee Supreme Court left Rule 11 – which provides for an application for permission to appeal and the standards governing the grant of review of such applications – unchanged. The Rules' advisory commission subsequently explained that, while the Court adopted Rule 39 "in

response to *O'Sullivan v. Boerckel,*" Rule 39 "*works no change* to T. R. A. P. 11 itself." Tenn. R. App. P. 11, 2002 Ad. Comm'n Cmt. (emphasis added). Moreover, recent studies demonstrate that approximately 7% to 10% of applications for permission to appeal are granted by the Tennessee Supreme Court. *See Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 1999-2000,* at 9 (2000) (reporting 83 applications granted, 714 denied (10.4% granted)); *Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 2000-01,* at 39 (2001) (reporting 69 applications granted, 878 denied (7.3% granted)); *Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 2001-02*, at 41 (2002) (reporting 63 applications granted, 772 denied (7.5% granted)). Thus, discretionary review by the Tennessee Supreme Court appears to be more "available" than the discretionary review before the Illinois Supreme Court when *Boerckel* was decided. *See* Br. of Resp't, at *6 n.2, *O'Sullivan v. Boerckel*, No. 97-2048 (U.S. filed Jan. 28, 1999), available at 1999 WL 61669 (indicating that the Illinois Supreme Court grants review in approximately 3% of cases).

Rule 11 remains a viable option for defendants. Notwithstanding the adoption of Rule 39, the Tennessee Supreme Court has maintained its requirement that counsel appointed for an indigent defendant "shall continue to act for the defendant ... in any subsequent proceedings or appeals until the case has been concluded or counsel has been relieved by the court," Tenn. S. Ct. R. 13, § 1(i), and that only by permission of the intermediate appellate court can counsel withdraw "before preparation and filing of an Application for Permission to Appeal in the

Supreme Court. . . . " Tenn. S. Ct. R. 14. Indeed, even after the adoption of Rule 39, the Tennessee Supreme Court continues to recognize "the *right* to seek second-tier review pursuant to Tennessee Rule of Appellate Procedure 11." *State v. Evans*, 108 S.W.3d 231, 234 (Tenn. 2003) (clarifying procedure for delayed Rule 11 appeals) (emphasis added). *See also* Tenn. S. Ct. R. 28, § 9(D)(1)(b) and (2)(b) (as amended by order filed Aug. 25, 2003) (permitting a delayed appeal to the supreme court when "petitioner was deprived of the right to request an appeal pursuant to Rule 11, Tennessee Rules of Appellate Procedure. . . . ")[2]

A state supreme court cannot make discretionary review unavailable by declaring it unnecessary for exhaustion, yet leaving it in place for use by any litigant. While "there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available," 526 U.S. at 847, Rule 39 has not made Tenn. R. App. P. 11 review unavailable. In fact, Rule 11 review remains as much a part of Tennessee's established appellate review process as the petition for discretionary review under Illinois' appellate review process. Thus, the Sixth Circuit's decision declaring it unavailable conflicts with this Court's decision in *O'Sullivan v. Boerckel*.

Citing a declaration by the South Carolina Supreme Court, virtually identical to Rule 39, *see In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 321 S.C. 563, 564, 471 S.E.2d 454 (1990), Justice

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[2] The current version, as amended, is available at http://www.tsc.state.tn.us/opinions/tsc/rulesofcourt/06supct25_end.htm#28.

Souter's concurring opinion in *Boerckel* suggests that this Court left open "the possibility that a state prisoner is likewise free to skip a procedure even when a state court has occasionally employed it to provide relief, so long as the State has identified the procedure as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion." 526 U.S. at 850. But *Boerckel* plainly did not hold efficacious a mere declaration that a remedy is unnecessary when that remedy clearly remains available in the ordinary appellate review process to any litigant wishing to use it.

In addition to the South Carolina and Tennessee Supreme Courts, courts in at least three other states have adopted similar rules. *See State v. Sandon*, 777 P.2d 220, 221 (Ariz. 1989) (declaring that prisoners need not petition the Arizona Supreme Court for discretionary review to exhaust state remedies); Ark. Sup. Ct. R. 1-2(h) (providing that appellants in criminal appeals or post-conviction cases "shall not be required to petition for . . . review in the Supreme Court following an adverse determination of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error"); *In re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, No. 218 Judicial Administration Docket No. 1 (Pa. May 9, 2000) (per curiam) (concluding that "in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing or allowance of appeal following an adverse decision by the Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error"). This Court should grant review to remove any doubt whether such rules or

declarations operate to render an otherwise available state remedy unavailable.

II. ASSUMING THAT TENNESSEE SUPREME COURT RULE 39 MAKES DISCRETIONARY REVIEW BY THAT COURT UNAVAILABLE, THE SIXTH CIRCUIT'S APPLICATION OF THE RULE RETROACTIVELY TO ADAMS' 1993 PROCEDURAL DEFAULT IS CONTRARY TO THIS COURT'S DECISION IN *O'SULLIVAN V. BOERCKEL*.

But even assuming that Rule 39 does make Rule 11 review unavailable now, the Sixth Circuit's retroactive application of the rule to Adams' case creates a result never contemplated in *Boerckel* and, indeed, that is contrary to its reasoning. Although Rule 39 by its terms purports to apply to "all appeals from criminal convictions or post-conviction review matters from and after July 1, 1967," the rule cannot alter the objective historical fact that such discretionary review *was available* in 1993. *See Wenger v. Frank*, 266 F.3d 218, 226 (3d Cir. 2001) ("While a state may, of course, prospectively change the remedies that are available under state law, if a remedy was available or unavailable at some time in the past, it is difficult to see how that fact can be retroactively altered.") Even the court of appeals acknowledged that "federal courts interpreting Tennessee law have, until the passage of Rule 39, always required appeal to the Tennessee Supreme Court as part of the habeas exhaustion requirement. . . . " (App. 13) (citing, *e.g.*, *Jones v. Jones*, 76 F.Supp.2d 850, 856-57 (E.D. Tenn. 1999); *Abdur'Rahman v. Bell*, 999 F.Supp. 1073, 1080 (M.D. Tenn. 1998), *vacated on other grounds by* 226 F.3d 696 (6th Cir. 2000); *Cole v. Campbell*,

703 F.Supp. 657, 659 (M.D. Tenn. 1988); *Layman v. Russell*, 300 F.Supp. 430, 431 (E.D. Tenn. 1969). Moreover, Adams availed himself of the remedy in 1993 by filing an application for permission to appeal and obtained a ruling from the Tennessee Supreme Court that, "[u]pon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be denied." (J.A. 87)

Furthermore, central to *Boerckel*'s rule of decision – "requiring state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State," 526 U.S. at 847 – is the rule of comity, which "dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." *Boerckel*, 526 U.S. at 844 (citations omitted). "Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts," this Court concluded "that state prisoners must give the state courts one full opportunity to resolve any constitutional issue by invoking one complete round of the State's established appellate review process." *Id.* at 845.

Retroactive application of Rule 39, however, serves no comity interest. According to the Tennessee Supreme Court, Rule 39 was adopted to deter criminal and post-conviction relief litigants' "routin[e] petition[ing] . . . for permission to appeal . . . in order to exhaust all available state remedies for purposes of federal habeas corpus litigation." (App. 68) But Rule 39 promotes that interest only when it operates to reduce *future* applications.

Clearly, retroactive application in Adams' case cannot have any beneficial effect upon the Tennessee Supreme Court's docket because that Court was required to dispose of his application in 1993.

On the other hand, retroactive application of Rule 39 could have profound consequences for federal district courts. The court of appeals' decision may subject all habeas claims since 1967 that were determined to be procedurally defaulted for failure to exhaust through an application for discretionary review to similar efforts to undo the defaults. *See Mattis v. Vaughn*, 128 F.Supp.2d 249, 262 (E.D. Pa. 2001) (remarking that holding a similar Pennsylvania Supreme Court rule retroactive "would instead greatly increase the burden on the federal courts without providing any additional relief to the Pennsylvania Supreme Court") (footnote omitted). This Court should grant review to determine whether the retroactive application of such a rule is consistent with the decision in *O'Sullivan v. Boerckel*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Frank E. Adams,
Petitioner-Appellant,

v.

Flora J. Holland, Warden,
Respondent-Appellee.

No. 00-6575

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 99-00519 – Robert L. Echols, Chief District Judge.

Argued: September 11, 2002

Decided and Filed: May 20, 2003

Before: BOGGS and COLE, Circuit Judges;
BATTANI, District Judge.*

COUNSEL

ARGUED: Paul R. Bottei, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Kim R. Helper, OFFICE OF THE ATTORNEY GENERAL,

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* The Honorable Marianne O. Battani, United States District Judge for the Eastern District of Michigan sitting by designation.

CRIMINAL JUSTICE DIVISION, Nashville, Tennesse, for Appellee. **ON BRIEF:** Mariah A. Wooten, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Kim R. Helper, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennesse, for Appellee.

AMENDED OPINION

BATTANI, District Judge.

Before the court is Petitioner-Appellant Frank Adams's appeal from the denial of his habeas petition by the Middle District of Tennessee, Honorable District Court Judge Robert L. Echols. Appellant now preserves for appeal his claim for habeas relief based on the state trial court's admission of his co-defendant Timothy Crowell's hearsay testimony at trial, arguing that the admission of that statement violated Appellant's rights under the Confrontation Clause of the U.S. Constitution. Appellee argues that Appellant has procedurally defaulted his habeas challenge on this issue by failing to argue it in front of the Tennessee Supreme Court, and alternatively, that the admission of the co-defendant's statements did not violate Appellant's constitutional rights. Appellant now appeals the District Court's ruling that his habeas claim has been procedurally defaulted. We **VACATE** and **REMAND** for further proceedings consistent with this opinion.

I. Factual Background

In February 1991, a jury in Davidson County, Tennessee, found Appellant guilty of the felony-murder of Thomas

Weser and two counts of aggravated robbery, for which Appellant was sentenced to life in prison plus twenty years. In October 1992, the Tennessee Court of Criminal Appeals affirmed those convictions. Appellant then applied for permission to appeal to the Tennessee Supreme Court, but did not specifically mention the Confrontation Clause issue before this court in that application, which was denied in June 1998.

In June 1999, Appellant filed his habeas petition before the District Court. The Magistrate Judge recommended that all of Appellant's habeas claims be dismissed except for his Confrontation Clause claim. The District Court agreed with the Magistrate Judge on all of the issues except for the Confrontation Clause issue; on the latter claim, the District Court found that Appellant had procedurally defaulted the claim by failing to bring it before the Tennessee Supreme Court in his application for permission to appeal. Appellant asked for a Certificate of Appealability from both the District Court and this court, and was denied both requests. He then filed a petition for Rehearing with this court on June 21, 2001. While this petition was pending, the Tennessee Supreme Court promulgated Tennessee Supreme Court Rule 39, which Appellant argues removes the procedural default assessed against his Confrontation Clause claim. Accordingly, on August 16, 2001, this court vacated the denial of Appellant's certificate of appealability, and granted a certificate on the following two issues: 1) whether, in light of Tennessee Supreme Court Rule 39, Appellant's Confrontation Clause claim is procedurally defaulted; and 2) if not, whether the admission of the co-defendant's statements violated Appellant's rights under the Confrontation Clause.

II. Discussion

This court reviews a district court's legal conclusions in a habeas proceeding de novo and its factual findings for clear error. *E.g., Miller v. Francis,* 269 F.3d 609, 613 (6th Cir. 2001).

A. Procedural Default

Appellant acknowledges that, were it not for Rule 39, his claim would be procedurally defaulted because review by a state supreme court is normally an "available state remedy" that must be exhausted before a federal habeas petition can be filed, even if the state supreme court has only discretionary appeals. *O'Sullivan v. Boerckel,* 526 U.S. 838, 847-48 (1999). Appellant concedes that he did not bring his Confrontation Clause issue before the Tennessee Supreme Court. Appellant argues, however, that in passing Rule 39, the Tennessee Supreme Court changed the landscape of exhaustion law in Tennessee. The rule reads in relevant part:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim.

Tenn. Sup.Ct. R. 39. Specifically, Appellant argues that Rule 39 removes review by the Tennessee Supreme Court as an "available state remedy" for any habeas claim after July 1, 1967, and that his Confrontation Clause issue has therefore not been procedurally defaulted by his failure to bring it before the Tennessee Supreme Court.

Appellee does not contest that Rule 39 purports to remove Tennessee Supreme Court review as an available state remedy for habeas purposes. Instead, Appellee argues that Rule 39 violates the Supremacy Clause of the U.S. Constitution because it conflicts with federal law as established in *O'Sullivan*. Appellee contends that, because discretionary review is still technically available in the Tennessee Supreme Court, *O'Sullivan* controls, and Rule 39 cannot displace federal law on the question of what counts as available state remedies. Appellee's alternative argument is that, even if Rule 39 did remove Tennessee Supreme Court review as an available state remedy, it did not do so "retroactively" and therefore Appellant's habeas claim is still procedurally defaulted. Specifically, Rule 39 was promulgated after Appellant's habeas petition had been submitted, and was promulgated even after Appellant had applied for a rehearing on the denial of his certificate of appealability. Appellee maintains that Rule 39, at most, removed Tennessee Supreme Court review for habeas petitions brought after its promulgation, and that Appellant's habeas claim therefore remains procedurally defaulted.

1. Rule 39 has made Tennessee Supreme Court review "unavailable"

The Supreme Court has recently held that even discretionary appeals by a state supreme court are available state

remedies that must be exhausted for habeas relief. *O'Sullivan,* 526 U.S. at 847-48. The *O'Sullivan* Court, however, explicitly excepted from its holding cases in which the state has explicitly disavowed state supreme court review as an "available state remedy." *Id.* at 847. In this regard, the Supreme Court stated that "we note that nothing in our decision today requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable." *Id.* The Supreme Court recognized that federal law does not prohibit a state from deciding for itself the availability of a particular state remedy. "The exhaustion doctrine, in other words, turns on an inquiry into what procedures are 'available' under state law . . . there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available." *Id.* at 847-48.

Rule 39 clearly removed Tennessee Supreme Court review as an antecedent for habeas purposes. By its terms, Rule 39 dictates that once the Court of Criminal Appeals has denied a claim of error, "the litigant shall be deemed to have exhausted all available state remedies available for that claim." Tenn. Sup.Ct. R. 39.

Appellee argues that Rule 39 has not technically made Tennessee Supreme Court review *unavailable,* however, since litigants have not been explicitly prohibited from appealing to the state supreme court. According to Appellee, Rule 39 would only have made Tennessee Supreme Court review "unavailable" if it had used explicit statements such as "a litigant shall hereby not be allowed to petition this Court for review," or "this Court will no longer, under any circumstances, review decisions of the Court of Criminal Appeals rejecting claims of error." Appellee's argument, however, fails to grasp the meaning

of the word "available" as it is used in *O'Sullivan,* and instead dwells upon a hypertechnical interpretation of that term. Appellee's misinterpretation is revealed by the *O'Sullivan* Court's examples of what might constitute making state supreme court review unavailable: namely, rules passed by the Supreme Courts of South Carolina and Arizona. *O'Sullivan,* 526 U.S. at 847. Although the *O'Sullivan* majority declined to rule definitively on whether those rules would change the law on exhaustion and procedural default, it did recognize that the rules were trying to make state supreme court review unavailable in those states for habeas purposes. *Id.* The South Carolina Supreme Court, for example, declared:

> We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for writ of certiorari upon the Court of Appeals' denial of relief in order to exhaust all available state remedies. We therefore declare that in all appeals from criminal convictions or post-conviction relief matters, *a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies.*

In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 321 S.C. 563, 564 (1990) (emphasis added) (footnote omitted). The *O'Sullivan* Court considered this South Carolina rule as trying to remove South Carolina Supreme Court review as an available

state remedy for habeas purposes, but reserved judgment as to whether the rule actually succeeded in doing so. *O'Sullivan,* 526 U.S. at 847-48.

It is worth noting that the highlighted language is essentially identical to that in Rule 39. Specifically, neither rule completely removes state supreme court review as an option for litigants; indeed, the South Carolina rule explicitly allows for the presentation of the claim to its Supreme Court. Both rules, however, establish that Supreme Court review is no longer part of the normal course of review for criminal appeals, and is not necessary for exhaustion of "all available state remedies." *See also State v. Sandon,* 161 Ariz. 157, 158 (1989) ("Once the defendant has been given the appeal to which he has a right [i.e., in the Court of Appeals], state remedies have been exhausted") (internal quotations omitted). The *O'Sullivan* Court pointed out that, contrary to Appellee's assertions, technically available remedies are still not "available" for habeas purposes when "those remedies are alternatives to the standard review process." *O'Sullivan,* 526 U.S. at 844 (citing *Wilwording v. Swenson,* 404 U.S. 249, 249-50 (1971)). Instead, when remedies are taken outside of the normal criminal review process, those remedies become "extraordinary:" technically available to the litigant but not required to be exhausted. *Id.*

Our view of the *O'Sullivan* opinion is bolstered by the concurring opinion of Justice Souter from that case. First, Justice Souter, who joined the majority, also cited the South Carolina rule as an example of a state making its Supreme Court review an "unavailable" state remedy, and echoed the majority opinion's citation of *Wilwording. O'Sullivan,* 526 U.S. at 849-50. Justice Souter made two further crucial observations about the majority opinion.

First, Justice Souter explained that under the majority opinion, a state supreme court did not have to "be subjected to constant applications for a form of discretionary review that the State wishes to reserve for truly extraordinary cases, or else be forced to eliminate that kind of discretionary review." *Id.* at 850. In other words, again contrary to Appellee's argument, a state supreme court can preserve discretionary review of criminal appeals while still dictating that review to be "unavailable" for habeas purposes. Second, Justice Souter stated his understanding "that we leave open the possibility that a state prisoner is likewise free to skip a procedure even when a state court has occasionally employed it to provide relief, so long as the State has identified the procedure as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion." *Id.*

Thus, the majority and concurring opinions from *O'Sullivan* lead us to believe that Rule 39 rendered Tennessee Supreme Court review "unavailable" in the context of habeas relief. Moreover, the language quoted above from *O'Sullivan* also indicates that this decision by the Tennessee Supreme Court does not violate the Supremacy Clause. A state law or rule violates the Supremacy Clause only if it explicitly conflicts with federal law. *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 663 (1993); *accord Southeastern Oakland County Res. Recovery Auth. v. City of Madison Heights,* 5 F.3d 166, 168 (6th Cir. 1993). As quoted above, the Supreme Court has not yet explicitly decided whether a rule like Rule 39 would remove state supreme court review for habeas purposes. *O'Sullivan,* 526 U.S. at 847-49. This statement alone shows that there is no "actual conflict" between Rule 39 and federal law. Even beyond this, however, the language quoted above from

O'Sullivan clearly shows the Supreme Court's view that the question of what constitutes the body of "available state remedies" is one of state law, not one of federal law: "there is *nothing* in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available . . . " *Id.* (emphasis added).

Finally, it should be pointed out that *every* other lower court that has considered, post-*O'Sullivan,* the effect of a rule like Rule 39 has held that such a rule permissibly eliminates state supreme court review as an available state remedy that must be exhausted. The Ninth Circuit found that *O'Sullivan* implicitly overruled its earlier position that Arizona could not remove state supreme court review as an available state remedy to be exhausted. *Swoopes v. Sublett,* 196 F.3d 1008, 1009-11 (9th Cir. 1999). Similarly, the Eighth Circuit held that a Missouri rule clearly stated its intent to place state supreme court review outside the set of available state remedies preceding habeas relief. *Randolph v. Kemna,* 276 F.3d 401, 404 (8th Cir. 2002); *see also Mattis v. Vaughn,* 128 F.Supp.2d 249, 256-61 (E.D. Pa. 2001). Appellee's attempt to rely on *Rodriguez v. Scillia,* 193 F.3d 913, 917 (7th Cir. 1999), is unsuccessful because Illinois has a discretionary appeal system *without* a rule like the one passed in Arizona, Pennsylvania, Missouri or Tennesee, and so O'Sullivan still applies there.

2. Rule 39 operates retroactively to prevent procedural default by Appellant in this case

Next we must address whether Rule 39 applies "retroactively" to Appellant's case in particular. Two Circuit Courts have considered whether a rule like Rule 39 can apply to habeas petitions filed before their promulgation,

and have come to opposite conclusions. Dealing with the Missouri rule, the Eighth Circuit rejected the State's argument that "because the amendment to Rule 83.04 has an effective date of July 1, 2002, its invocation" did not help the petitioner, who filed for habeas relief before that date. *Randolph,* 276 F.3d at 404. The Eighth Circuit based its conclusion on the Rule's language, which indicated that it was not changing Missouri law to exclude state supreme court review as an available remedy, but rather was clarifying what had already been Missouri law. *Id.* "The order recites that 'In order to state the existing law in Missouri, the Court notes that transfer of a case . . . to this Court . . . is not part of the standard review process for the purposes of federal habeas corpus review.'" *Id.* The *Randolph* court reasoned that because the announcement of the Missouri rule purported to clarify the existing law, rather than change it, the rule had applied when the petitioner had filed for habeas relief, and so was not even being applied retroactively in that case. *Id.*

On the other hand, the Third Circuit refused to apply the Pennsylvania rule, passed in May 2000, to remove the procedural default from a habeas petition filed before that date. *Wenger v. Frank,* 266 F.3d 218, 225-226 (3rd Cir. 2001). The Third Circuit based its conclusion on three considerations. First, it looked to the language of the Pennsylvania rule, which announced, "AND NOW, this 9th day of May, 2000 . . . we hereby declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing or allowance of appeal . . . in order to be deemed to have exhausted all available state remedies . . . This Order shall be effective immediately." *Id.* at 224-25 (internal

quotations omitted). The Third Circuit found that language to allow application of the rule only on or after May 9, 2000, because it announced that it would be "effective immediately," not as of some prior date. *Id.* at 225. Based on that same language, the *Wenger* court also found that the Pennsylvania rule had amended Pennsylvania law, and that prior to its passage, state supreme court review had been an available state remedy in Pennsylvania. *Id.* at 226. This, of course, stands in contrast to the language of the Missouri rule, which established that it was clarifying existing law rather than creating different law on the subject. Finally, the Third Circuit invoked policy considerations, surmising that allowing retroactive application of the Pennsylvania rule would not serve the rule's purpose of easing the burden on the state supreme court's docket because the state supreme court had already passed on those petitions filed before the rule. *Id.* at 225-26 (citing *Mattis,* 128 F.Supp.2d at 262). Thus, the rule would merely serve to burden the federal courts with erstwhile dormant habeas cases, without providing any corresponding benefit to the state court system. *Mattis,* 128 F.Supp.2d at 262.

The instant case seems more similar to the one in *Randolph* than in *Wenger* because of the language of Rule 39. Specifically, Rule 39 announced its applicability to "all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967." Tenn. Sup.Ct. R. 39. This language clearly distinguishes it from the Pennsylvania rule discussed in *Wenger,* which used only prospective language. Similarly, this language from Rule 39 indicates that it is merely clarifying the state of Tennessee law as it has existed since 1967, not changing the law of available state remedies, making this case like the one in

Randolph and distinguishing it from that in *Wenger.* Indeed, in its order promulgating Rule 39, the Tennessee Supreme Court explicitly stated that it was clarifying rather than changing existing law.

> We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. *In order to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes,* we hereby adopt the following Rule 39.

In re: Order Establishing Rule 39, Rules of the Supreme Court of Tennessee: Exhaustion of Remedies (Tenn. Sup.Ct. June 28, 2001). This reading is also bolstered by the Tenn. R. App. P. 11 advisory committee's note, which explains that Rule 39 "works no change to" Tenn. R. App. P. 11, the rule governing appeal to the Tennessee Supreme Court. In short, the language and history of Rule 39 strongly persuades this Court that it should be applied retroactively.

The Court recognizes that federal courts interpreting Tennessee law have, until the passage of Rule 39, always required appeal to the Tennessee Supreme Court as part of the habeas exhaustion requirement, suggesting that perhaps Rule 39 changed Tennessee law rather than merely clarifying it. *E.g., Jones v. Jones,* 76 F.Supp.2d 850, 856-57 (E.D. Tenn. 1999); *Abdur'Rahman v. Bell,* 999 F.Supp. 1073, 1080 (M.D. Tenn. 1998), *vacated on other grounds by* 226 F.3d 696 (6th Cir. 2000); *Cole v. Campbell,* 703 F.Supp. 657, 659 (M.D. Tenn. 1988); *Layman v. Russell,* 300 F.Supp. 430, 431 (E.D. Tenn. 1969). As the

language quoted from the Order above shows, however, the Tennessee Supreme Court was also cognizant of this federal court history and sought to clarify the law with respect to Rule 39. Finally, this Court notes the policy argument discussed by the Third Circuit in *Wenger,* but respects Tennessee's law on the subject of what constitutes available remedies within its own state, even if it results in increased burden on the federal courts. This is true especially here, where Rule 39 clarifies existing law rather than changing the law. For all of these reasons, this Court applies Rule 39 to Appellant's case and finds that his Confrontation Clause claim is not procedurally defaulted.

B. The request to amend the record

Appellant observes that the record before the District Court omitted the transcript of the closing arguments from his trial. Appellant alleges that the closing argument transcript is replete with evidence that the prosecution relied heavily on Crowell's statements in securing his conviction at trial. Appellant argues that, in order to determine whether he deserves habeas relief, this Court must have the entire trial record before it, especially such material portion as the closing argument. Accordingly, Appellant urges the Court to amend the record before it by adding the closing argument transcript, and offers that the Court has power to so amend the record under Fed. R. App. P. 10(e)(2)(b).

Appellee does not contest the materiality of the closing argument transcript. Rather, Appellee submits that Fed. R. App. P. 10(e) does not authorize this Court to amend the record as Appellant requests. Specifically, Appellee argues that this Court cannot examine evidence

that was before neither the state appellate courts nor the District Court.

Rule 10(e) allows amendment of the record on appeal only under two circumstances: "(1) when the parties dispute whether the record actually discloses what occurred in the District Court and (2) when a material matter is omitted by error or accident." *E.g., United States v. Barrow,* 118 F.3d 482, 487 (6th Cir. 1997). Thus, the purpose of amendment under this rule is to ensure that the appellate record accurately reflects the record before the District Court, *not* to provide this Court with new evidence not before the District Court, even if the new evidence is substantial. *Id.* at 487-88 (citing *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.,* 678 F.2d 636, 641 (6th Cir. 1982)). Apart from Rule 10(e), however, a District Court must make a review of the entire state court trial transcript in habeas cases, and where substantial portions of that transcript were omitted before the District Court, a habeas case should be remanded to the District Court for consideration in light of the full record. *Hall v. Arbogast,* No. 88-5529, 1989 WL 119371, at **1 (6th Cir. Oct. 12, 1989) (citing *Townsend v. Sain,* 372 U.S. 293, 319 (1963)).

Although there is no published Sixth Circuit law on the subject, the above citation from *Hall* indicates that the entire trial transcript, including the closing arguments, should have been reviewed by Judge Echols, and that the case should now be remanded back to the District Court for review in light of the full record. The other Circuit Courts that have considered the issue have unanimously adopted this approach. *Magouirk v. Phillips,* 144 F.3d 348, 362-63 (5th Cir. 1998); *Aliwoli v. Gilmore,* 127 F.3d 632, 633-34 (7th Cir. 1997); *Beck v. Bowersox,* 257 F.3d 900,

901-02 (8th Cir. 2001); *Jones v. Wood,* 114 F.3d 1002, 1008 (9th Cir. 1997) (citing *Vicks v. Bunnell,* 875 F.2d 258, 259 (9th Cir. 1989) ("the court must at least have the entire trial transcript" to make a habeas determination)). Appellee contends that these cases are inapposite because they deal with situations where at least the reviewing *state* courts had the entire transcripts before them, whereas here, the state appellate courts did not have the full record. Nothing in the language of these cases, however, limits their holdings in this manner; they all stand for the proposition that the District Court *must* have the trial transcript before it when making habeas determinations. Appellee is correct in noting that this Court cannot be the first to review these new transcript portions, i.e., without their having been before the District Court. *E.g., S & E Shipping,* 678 F.2d at 641. This does not mean, however, that this Court should ignore the need to peruse the entire trial transcript, but rather, it indicates that this Court should remand the case to the District Court for consideration in light of the full record. *Hall,* 1989 WL 119371, at **1 ("the district court should review the state transcript. Therefore, the motion to remand is well-taken"); *Beck,* 257 F.3d at 901-02.

C. The Confrontation Clause claim

Also before the court is Appellant's Confrontation Clause claim. As stated above, the appropriate course of action is to remand the case rather than consider the merits of the claim at this time, and so the Court does not yet reach the merits of appellant's habeas claim.

III. Conclusion

For the reasons stated above, we VACATE the judgment of the District Court denying Appellant's habeas petition on procedural default grounds, and REMAND for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FRANK E. ADAMS,	)	
	)	
Petitioner,	)	No. 3:99-0519
v.	)	JUDGE ECHOLS
	)	
FLORA HOLLAND, Warden,	)	
	)	
	)	
Defendant.	)	

ORDER

(Filed Oct. 19, 2000)

Presently pending before the Court is the Magistrate Judge's Report and Recommendation ("R&R") (Docket Entry No. 30), to which both parties have filed objections.[1] Petitioner, an inmate currently in the custody of the Tennessee Department of Corrections, seeks a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on a total of ten separate grounds. This case was referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) to conduct proceedings under Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 304 of the Local Rules for Magistrate Proceedings. (Docket Entry No. 9). The Magistrate Judge now recommends that Respondent's Amended Motion to Dismiss and

[1] Petitioner's submission is styled "Petitioner's Motion to Adopt the Magistrate's Report and Recommendation in Part and Petitioner's Objections to the Magistrate's Report and Recommendation." (Docket Entry No. 32). The Court construes this as Petitioner's Objections to the Report and Recommendation and Response to the Respondent's Objections.

for Summary Judgment (Docket Entry No. 27) be granted with respect to nine of Petitioner's claims and denied with respect to one.

Under 28 U.S.C. § 636(b) (1) and Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts, the Court is required to review the Magistrate Judge's recommendations de novo. The Court may "accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate." R. Gov. Sec. 2254 Cases 8(b); *see also* 28 U.S.C. § 636(b)(1).

After thoroughly reviewing the record in this case, including the Magistrate Judge's R&R and the objections filed thereto, the Report and Recommendation is hereby ADOPTED IN PART, ADOPTED AS MODIFIED IN PART, and REJECTED IN PART. For the reasons explained in the Memorandum entered contemporaneously herewith, the Court rules as follows.[2]

1.) Regarding Respondent's Motion for Summary Judgment on Petitioner's claim of ineffective assistance of counsel at trial, the Report is hereby ADOPTED AS MODIFIED, and the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion for Summary Judgment on this claim, and the claim is hereby DISMISSED.

2.) Regarding Respondent's Motion to Dismiss Petitioner's claim of ineffective assistance of counsel on

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[2] There appears to have been some confusion in the submissions and the R&R about how these claims are numbered. The Court numbers them one through ten in the order Petitioner presented them.

direct appeal, the Report is hereby ADOPTED IN PART and REJECTED IN PART, and the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

3.) Regarding Respondent's Motion for Summary Judgment on Petitioner's claim of improper consolidation of indictments, the Report is hereby REJECTED, but the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion for Summary Judgment on this claim, and the claim is hereby DISMISSED.

4.) Regarding Respondent's Motion for Summary Judgment on Petitioner's claim that the trial court's jury instruction on reasonable doubt unconstitutionally lowered the prosecution's burden of proof, the Report is hereby REJECTED, but the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion for Summary Judgment on this claim, and the claim is hereby DISMISSED.

5.) Regarding Respondent's Motion to Dismiss Petitioner's claim of ineffective assistance of counsel during post-conviction proceedings, the Report is hereby ADOPTED AS MODIFIED, and the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

6.) Regarding Respondent's Motion to Dismiss Petitioner's claim of a *Miranda* violation, the Report is hereby REJECTED, but the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to

Dismiss this claim, and the claim is hereby DISMISSED.

7.) Regarding Respondent's Motion to Dismiss Petitioner's claim that the admission of his co-conspirator's hearsay statements at trial violated his constitutional right to confront his accusers, the Report is hereby REJECTED, and the Recommendation that the motion be denied is also hereby REJECTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

8.) Regarding Respondent's Motion to Dismiss Petitioner's claim that the trial court improperly ordered Petitioner's sentences to run consecutively, both the Report and Recommendation that the motion be granted are hereby REJECTED AS MOOT because Petitioner has withdrawn the claim. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

9.) Regarding Respondent's Motion to Dismiss Petitioner's claim of actual innocense [sic], the Report is hereby REJECTED, but the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

10.) Regarding Respondent's Motion to Dismiss Petitioner's claim of insufficient evidence, the Report is hereby ADOPTED AS MODIFIED, and the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

Accordingly, Respondents Motion to Dismiss and for Summary Judgment is GRANTED as to all claims, Petitioner's

Application for a Writ of Habeas Corpus is DENIED, and this case is hereby DISMISSED. Since Petitioner has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), a certificate of appealability shall not issue.

It is so ORDERED.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FRANK E. ADAMS,	)	
	)	
Petitioner,	)	No. 3:99-0519
v.	)	JUDGE ECHOLS
	)	
FLORA HOLLAND, Warden,	)	
	)	
Defendant.	)	

MEMORANDUM

(Filed Oct. 19, 2000)

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for Summary Judgment (Docket Entry No. 27) be granted with respect to nine of Petitioner's claims and denied with respect to one.

Under 28 U.S.C. § 636(b)(1) and Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts, the Court is required to review the Magistrate Judge's recommendations de novo. The Court may "accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate." R. Gov. Sec. 2254 Cases 8(b); *see also* 28 U.S.C. § 636 (b) (1) .

After thoroughly reviewing the record in this case, including the Magistrate Judge's R&R and the objections filed thereto, the Report and Recommendation is hereby ADOPTED IN PART, ADOPTED AS MODIFIED IN PART, and REJECTED IN PART. For the reasons explained herein, Respondent's Motion to Dismiss and for Summary Judgment is GRANTED as to all claims.

I.

The Court adopts the Magistrate Judge's recitation of the facts (R&R at 2) and procedural history (R&R at 2-5) with one exception. The Court does not adopt the phrase "implying that all claims had been considered" in the following sentence: "In its denial of his application to appeal on June 28, 1993, the [Tennessee Supreme] Court stated that it had considered 'the application for permission to appeal and the entire record in this cause,' implying that all claims had been considered." (R&R at 3). The natural reading of the statement is simply that the Tennessee Supreme Court had considered both the parties' briefs and the entire record – as opposed to just the briefs or just the briefs and an abbreviated version of the record

(like what is often presented to federal courts of appeals in the form of a joint appendix). This Court is unwilling to infer from a routine remark in a standard summary order that the Tennessee Supreme Court had taken the highly unusual step of considering claims that had not been presented to it.

The Court also notes the history of Petitioner's legal representation. Petitioner had two attorneys before trial: Ross Alderman, who was replaced because he left his position, and Mike Engle, who was replaced because Petitioner was unsatisfied with his services. (Docket Entry No. 15, Add. 5, at 4). Petitioner was then represented at trial by two more attorneys: the Metropolitan Public Defender himself, Karl F. Dean, and an Assistant Public Defender, Laura C. Dykes. On direct appeal to the Tennessee Court of Criminal Appeals, Petitioner appears to have been represented again by Mr. Dean and by Jeffrey A. Devasher, who was a Senior Assistant Public Defender and Petitioner's fifth attorney. When the case went to the Tennessee Supreme Court, Petitioner was represented only by Mr. DeVasher. During Petitioner's state post-conviction proceedings before the trial court and the Tennessee Court of Criminal Appeals, Petitioner was represented by a sixth attorney, William C. Roberts, Jr., who was in private practice. Petitioner appealed the denial of post-conviction relief to the Tennessee Supreme Court pro se. In the pending proceedings, Petitioner is represented by his seventh attorney, Mariah A. Wooten, the First Assistant Federal Public Defender.

II.

Because Defendant has attached evidence outside the pleadings in support of its position, the Court treats Defendant's Amended Motion to Dismiss and for Summary Judgment as one for summary judgment. *See* Fed. R. Civ. P. 12(b) ("If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . . "). In ruling on a motion for summary judgment, this Court must construe the evidence produced in the light most favorable to the non-moving party, drawing all justifiable inferences in his or her favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A party may obtain summary judgment if the evidentiary material on file shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of satisfying the court that the standards of Rule 56 have been met. *See Martin v. Kelley*, 803 F.2d 236, 239 n.4 (6th Cir. 1986). The ultimate question to be addressed is whether there exists any genuine issue of material fact which is disputed. *See Anderson*, 477 U.S. at 248. If so, summary judgment dismissal is inappropriate.

To defeat a properly supported motion for summary judgment, an adverse party "must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e). The non-moving party's burden of providing specific facts demonstrating that there remains

a genuine issue – for trial is triggered once the moving party "show[s] – that is, point[s] out to the district court – that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986).

III.

Petitioner seeks a Writ of Habeas Corpus pursuant to 28 U.S.C. 2254, alleging that Respondent holds him in custody in violation of the Constitution and laws of the United States. He has claimed ten such violations. Since procedural default is an issue on most of Petitioner's claims, the Court will first state the relevant rules regarding procedural default and then consider the ten claims seriatim.

Federal habeas relief is available to state prisoners only after they have exhausted their claims in state court. *See* 28 U.S.C. §§ 2254(b)(1), (c). To exhaust a claim, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel,* 526 U.S. 838, 844 (1999). That includes "present[ing] [the] claim[ ] to a state supreme court in a petition for discretionary review." *Id.* at 839-40.

When a federal court is presented with an application for a writ of habeas corpus that contains an unexhausted claim, the court must either dismiss the entire petition or permit the applicant to withdraw the unexhausted claims, leaving the court with an application that contains only exhausted claims. *See Rose v. Lundy,* 455 U.S. 509, 510 (1982). However, if the Petitioner is no longer able to raise the unexhausted claim in state proceedings (for example,

if the time for raising the claim in state court has passed), the claim is procedurally defaulted. *See Harris v. Reed,* 489 U.S. 255, 269-70 (1989). In such a case, the applicant has no state remedies left to pursue, so the court is to dismiss the procedurally defaulted claim but not the entire petition. *See Hannah v. Conley,* 49 F.3d 1193, 1195-96 (6th Cir. 1995).

However, the procedural default of a claim is excused under two circumstances. First, if the petitioner can demonstrate cause for the default and prejudice therefrom the federal court will consider the merits of the claim. *See Edwards v. Carpenter,* 120 S. Ct. 1587, 1591 (2000) (citing *Coleman v. Thompson,* 501 U.S. 722, 750 (1991)). Second, the default is excused if "the habeas petitioner can demonstrate a sufficient probability that . . . failure to review his federal claim will result in a fundamental miscarriage of justice." *Edwards,* 120 S. Ct. at 1591 (citing *Coleman,* 501 U.S. at 750).

In the case at bar, Petitioner is unable to return to state court, and therefore any claims that he failed to exhaust are now procedurally defaulted. Tennessee law permits the filing of only one petition for post-conviction relief and directs that subsequent petitions be "summarily dismissed." Tenn. Code Ann. § 40-30-202(c). Moreover, the one-year statute of limitations for filing a petition for post-conviction relief lapsed on May 10, 1996. *See* Tenn. Code Ann. § 40-30-202(a) (petition must be filed within one year of the date of the final action of the highest state appellate court to which an appeal is taken and the statute of limitations is to be strictly enforced); *Carothers v. State,* 980 S.W.2d 215 (Tenn. Crim. App. 1997) (statutes of limitations on post-conviction petitions that had not lapsed by May 10, 1995, the effective date of the 1995 Post-Conviction

Procedure Act, lapse on May 10, 1996). Finally, even if Petitioner could file in the state courts, they would consider the issue waived. *See* Tenn. Code Ann. § 40-30-206(g).

1.

In his first claim for relief, Petitioner contends that his counsel at trial was constitutionally ineffective. *See Strickland v. Washington,* 466 U.S. 668 (1984). He alleges five deficiencies: (1) failing to interview witnesses, (2) failing to challenge inconsistent testimony, (3) failing to investigate and impeach the co-defendant's credibility regarding prior drug use, (4) failing to challenge an in-court identification, and (5) failing to object to the jury instruction on the burden of proof, i.e. the meaning of the term "reasonable doubt." The Warden responds that Petitioner's counsel at trial did not fall below the constitutionally required minimum and moves for summary judgment. The Magistrate Judge agreed with the Warden and recommended that the motion be granted. The Court agrees and adopts the Report on this issue with regard to the first four alleged deficiencies. However, the Court finds the fifth deficiency, failing to object to the jury instruction on "reasonable doubt," to have been procedurally defaulted.

With regard to the first four deficiencies, the Court wishes to include one additional consideration to the Magistrate Judge's Report in order to further justify the basis for its decision. Petitioner devoted most of his argument to try to establish that the alleged deficiencies by his trial counsel would, if true, entitle him to habeas relief. However, the only evidence presented to the Court of the alleged deficiencies is the transcript of Petitioner's post-conviction proceedings

before the Davidson County Criminal Court. The judge who presided over those proceedings made extensive findings of fact which tend to demonstrate (if they do not do so conclusively) that Petitioner's first four alleged deficiencies have no factual basis. Because "a determination of a factual issue made by a State court shall be presumed to be correct," 28 U.S.C. § 2254(e)(1), and Petitioner has not presented a scintilla of evidence to overcome his "burden of rebutting the presumption of correctness by clear and convincing evidence," *id.*, the Court must accept the state trial court's findings of fact as true. Therefore, there is no genuine issue of material fact regarding these four issues.

Petitioner's fifth alleged deficiency in his trial counsel's performance is his failure to object to the jury instruction regarding the definition of the term "reasonable doubt." Although Petitioner raised the claim of ineffective assistance of trial counsel to the Tennessee courts, he never alleged this as one of the grounds for that claim. (Docket Entry No. 7, Addendum 2 at 2, 4; Docket Entry No. 21, Addendum at 4-7, 10, 13-15; Docket Entry 15, Addendum 1 at iv, 4; Docket Entry No. 15, Addendum 5 at 3, 10; Docket Entry No. 15, Addendum 3 at 2, 3). A habeas petitioner has not exhausted his state remedies if he has merely presented a particular legal theory to the courts, without presenting each factual claim. *See Pillette v. Foltz,* 824 F.2d 494, 497-98 (6th Cir. 1987). Surprisingly, the Warden never argues that this claim is procedurally defaulted. Unlike the first four grounds for ineffective assistance of counsel, no additional facts have been provided to the Court to aid in resolving this complicated legal issue by either party or the Magistrate Judge. At first blush, it appears that the Court would have to determine (1)

whether the jury instruction was unconstitutional, and (2) if it was, whether it was ineffective assistance of counsel not to raise it, and (3) if it was, whether the standard for habeas relief in 28 U.S.C. § 2254(d) applies since the claim has not been adjudicated on the merits in any state court proceeding, and (4) if it does, whether the denial of the claim would be "contrary to, or ... an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." If 2254(d) does not apply, the Court would have to determine what standard does apply and whether the alleged error satisfies it.

Since the parties have ignored this procedural default issue, the Court will raise it sua sponte.[2] The Warden has not waived it, *see* 28 U.S.C. § 2254(b)(3) (waiver must be express), and the issue is defaulted because Petitioner has not presented it to any Tennessee state court and his time for doing so has passed. The only remaining issue is whether the default can be excused.

Generally a court that raises the procedural default issue sua sponte should allow the habeas petitioner to present grounds to excuse the default. *See, e.g., Fisher v. Texas,* 169 F.3d 295, 301-02 (5th Cir. 1999). However, the Court should also balance concerns of comity, judicial efficiency, and finality. *See Royal v. Taylor,* 188 F.3d 239,

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[2] It is generally agreed that a habeas court may do so. *See, e.g., Yeatts v. Angelone*, 166 F.3d 255, 261-62 (4th Cir. 1999) (joining eight other circuits in so holding). The Sixth Circuit has raised the issue of procedural default sua sponte, *see Elzy v. United States*, 205 F.3d 882, 886 (2000), but it does not appear to have ruled explicitly that a district court may do so.

246 (4th Cir. 1999) (citing *Yeatts,* 166 F.3d at 261, 262, 300-01). In the case at bar, Petitioner was on notice that procedural default was an issue on six other claims, and he briefed the issue extensively with respect to those claims. There is no reason to believe that Petitioner was not aware of the procedural default defense to the jury instruction claim. The Court finds that Petitioner's failure to raise the issue to any Tennessee state court without sufficient excuse for not doing so is fatal. Courts have held that additional briefing is not necessary in similar circumstances. *See, e.g., Elzy,* 205 F.3d at 887; *Ramos v. Keane,* No. 9 CIV. 1604, 2000 WL 12142 (S.D.N.Y. Jan. 6, 2000). Furthermore, the case has already been on this Court's docket for 15 months, and the crime that gave rise to it occurred over 11 years ago. Balancing these concerns, the Court sees little value in ordering yet another round of briefs. The Court holds, therefore, that Petitioner has procedurally defaulted his claim that his trial counsel was constitutionally ineffective in failing to object to the "reasonable doubt" jury instruction and that the default is not excused.

2.

In his second claim for relief, Petitioner contends that his counsel on direct appeal was constitutionally ineffective. The Warden moves to dismiss on the ground that Petitioner has procedurally defaulted this claim. Although Petitioner acknowledges that his claim is procedurally defaulted, he contends that the default should be excused on the basis that he can establish cause for the default and prejudice therefrom. (Reply Gov't's Am. Mot., Dismiss and Summ. J. at 5). The Magistrate Judge recommended that the Motion to Dismiss be granted both because Petitioner

has not established a basis to excuse the procedural default and, in the alternative, because Petitioner's counsel on direct appeal was not constitutionally ineffective.

The Court agrees that the motion should be granted but does not reach the merits. Instead, the Court finds that Petitioner has not established a basis to excuse the procedural default. Petitioner has posited the ineffective assistance of his post-conviction counsel as "cause" for his procedural default. However, the Supreme Court rejected that very argument in *Coleman,* 501 U.S. at 752-56. Petitioner asks this Court to carve out a special exception to *Coleman* and hold that ineffective assistance of post-conviction counsel can serve as "cause" to excuse a procedural default when appellate counsel was also constitutionally ineffective. That would simply contradict the plain language of *Coleman*: "We reiterate that counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation." 501 U.S. at 755. Because Petitioner had no constitutional right to an attorney during his state post-conviction proceedings, it was impossible for his attorney's performance at the state post-conviction proceedings to be constitutionally ineffective. *See id.,* at 752.

The Court also notes that Petitioner asserts constitutionally ineffective assistance of counsel only during his appeal to the Tennessee Supreme Court, Petitioner's second appeal. (Reply Gov't's Am. Mot. Dismiss and Summ. J. at 4). Although the Warden does not raise it, Petitioner had no right to effective assistance of counsel at that proceeding. A criminal defendant has a right to effective assistance of counsel in his first appeal as of right, *see Evitts v. Lucey,* 469 U.S. 387, 396 (1985), but the

United States Supreme Court has declined to extend the right any further, *see, e.g.*, *Ross v. Moffitt*, 417 U.S. 600 (1974); *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Therefore, even if Petitioner could establish "cause and prejudice" to excuse the procedural default, the Court would have to dismiss the claim anyway.

3.

In his third claim for relief, Petitioner contends that the trial court improperly consolidated the indictments, forcing Petitioner to stand trial simultaneously for an armed robbery and a robbery-murder even though the events occurred one hour and twenty minutes apart. Petitioner contends that the consolidation violated his constitutional right to a fair trial as guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments. The Warden moves for summary judgment on the ground that consolidation of the indictments was not constitutional error, and even if it was, the error was harmless. The Magistrate Judge ruled that the error was harmless and recommended that the Motion for Summary Judgment be granted. The Court agrees that the motion should be granted but for different reasons.

Despite the parties' discussion of the Tennessee Court of Criminal Appeals' decision that the consolidation of the indictments violated the Tennessee Rules of Criminal Procedure (*see State v. Adams*, 859 S.W.2d 359, 362-63 (1992)), this ruling is not controlling on this Court's consideration of the claim. A federal "district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court *only* on the ground that he is in custody in

violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). As such, the Court's discussion is limited to the due process issue.

With regard to the due process issue, the Court notes that once again the Warden has failed to raise a procedural default. Although Petitioner asserted at trial and to both state appellate courts on direct review that the consolidation of the indictments was improper, he must assert the constitutional, not just the state law, claim to preserve it. *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). The Court has been unable to find any constitutional objection to the consolidation of indictments in the trial record. (T.R. 25, 31-35, 44, 71; Tr. 97-126, 145-52, 162-87, 520-21, 750). Furthermore, Petitioner devoted a mere sentence to the constitutional issue in his brief to the Tennessee Court of Appeals (Docket Entry No. 7, Addendum 1 at 37), which essentially ignored the subject, *see Adams,* 839 S.W.2d at 360, 362-63. Finally, when Petitioner presented the matter to the Tennessee Supreme Court, only a general allegation of constitutional violation was mentioned. (Docket Entry No. 7, Addendum 2 at 6). "It is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Gray v. Netherland*, 518 U.S. 152, 162 (1996) (citing *Anderson v. Harless,* 459 U.S. 4 (1982)). A grand total of two sentences in three proceedings, particularly when the sentences themselves are nothing more than blanket assertions, does not "fairly present" the issue to the state courts. *See generally Picard v. Connor*, 404 U.S. 270 (1971).

For the same reasons discussed in the portion of this Memorandum addressing Petitioner's allegation that his

trial counsel was constitutionally ineffective, the Court is again inclined to raise the issue sua sponte and rule that the issue is defaulted. However, this time the Warden does not merely fail to raise the procedural default issue, but he concedes (incorrectly) that "the issue is properly before this Court under 28 U.S.C. § 2254(a)." (Mem. Law Supp. Resp't's Am. Mot. Dismiss and Summ. J. at 13). This could be construed as a waiver of the procedural default issue, but "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). Nonetheless, some courts have construed similar statements as an "express waiver." *See, e.g., United States v. Cooper*, 965 F. Supp. 1140, 1142 n.3 (N.D. Ill. 1997); *Mandelaka v. Snyder*, No. C.A. 96-457, 1998 WL 299360, at *6 n.3 (D. Del. May 22, 1998). The Sixth Circuit does not appear to have had occasion to address the issue.

The Court respectfully disagrees with those decisions that hold that statements similar to Respondent's constitute an "express waiver." The Court finds that the Warden's statement "the issue is properly before this Court" is an incorrect concession that Petitioner has exhausted his state-court remedies.[3] A waiver, on the other hand, is an "intentional or voluntary relinquishment of a known right." Black's Law Dictionary, 6th ed. 1990. If the government had known that it had a right to raise procedural default and wished to waive it knowingly and voluntarily,

[3] In this case, of course, failure to exhaust is tantamount to a procedural default since state remedies are no longer available to Petitioner.

it would not have made a statement equivalent to saying it had no such right at all. Furthermore, the Court cannot infer waiver from the Warden's conduct because the statute requires the waiver to be "express."

Therefore, the Court concludes that the state has not waived its procedural default defense. The Court raises the defense sua sponte for the same reasons as stated when it raised the issue on Petitioner's claim for ineffective assistance of counsel in failing to object to the jury instruction on the burden of proof. The Court concludes that Petitioner has defaulted the claim. Finally, the default is not excused for the same reasons it was not excused on the seven other defaulted issues.[4]

4.

In his fourth claim for relief, Petitioner contends that the trial court's jury instruction on reasonable doubt unconstitutionally lowered the prosecution's burden of proof. The Warden moves for summary judgment on the ground that the instruction was not unconstitutional but also notes that the Tennessee Court of Criminal Appeals considered this claim to have been waived. Petitioner does not address the procedural default issue. The Magistrate Judge concluded that the jury instruction was not unconstitutional and recommended that the motion be granted. The Court agrees that the motion should be granted but

[4] The Tennessee Office of the Attorney General is advised that a federal court is not required to raise the issue of procedural default sua sponte. *See Trest v. Cain*, 522 U.S. 87 (1997). Therefore, if the government fails to raise the issue in this Court in the future, it does so at its own risk.

does not reach the merits. Instead, the Court concludes that Petitioner has procedurally defaulted this claim.

This issue appears to have been raised for the first time before the Tennessee Court of Appeals during the post-conviction proceedings. (Docket Entry No. 15, Addendum 1 at iv, 5-8; Docket Entry No. 15, Addendum 5 at 3). The Court has been unable to find any reference to it in the trial record, which is over 800 pages long, and no mention of it was made when the trial court was considering other jury instructions (Tr. 680-87). It was not raised to the Tennessee Court of Appeals on direct review. (Docket Entry No. 7, Addendum 1 at 2); *see also* 839 S.W.2d at 360. Petitioner did not include it in his Application for Permission to Appeal to the Tennessee Supreme Court. (Docket Entry No. 7, Addendum 2 at 2, 4). Finally, it was not considered by the trial court during post-conviction proceedings. (Docket Entry No. 15, Addendum 5 at 10). When the post-conviction proceedings reached the Tennessee Court of Appeals, it addressed the merits but only as an alternative holding.

> [T]he Petitioner contends that the instruction submitted to the jury regarding reasonable doubt was constitutionally insufficient and a violation of due process. At the outset, we note that the Petitioner did not address this issue until this appeal. Although he briefly alluded to the issue during his testimony at the post-conviction hearing, neither the original pro se petition nor the amended petition contained this issue. Furthermore, the trial court did not address the issue in its order nor has the Petitioner alleged any reason why a waiver would not apply. See Tenn. Code Ann. § 40-30-206(g). However, *even if we*

> *were to address the issue, we would conclude* that it had no merit.

Adams v. State, No. 01C01-9609-CR-00401, 1997 WL 803585, at *6, (Tenn. Crim. App. Dec. 30, 1997) (emphasis added). When a state court's primary holding is a state procedural bar, the existence of an alternative holding does not vitiate the bar. *See Coe v. Bell*, 161 F.3d 320, 330 (6th Cir. 1998) (citing *Harris v. Reed*, 489 U.S. 255 (1989)). As such, the claim is defaulted.

Petitioner has not suggested any reason why this procedural default should be excused, so the Court finds that there is none.

5.

In his fifth claim for relief, Petitioner contends that his counsel during the state's post-conviction proceedings was constitutionally ineffective. The Court agrees with the Warden and the Magistrate Judge that *Coleman*, 501 U.S. at 752 (citing cases), forecloses this claim. Furthermore, 28 U.S.C. § 2254(i) states, "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." Therefore, with respect to this issue, the Court adopts the Magistrate Judge's R&R.

6.

In his sixth claim for relief, Petitioner contends that the trial court admitted various statements into evidence in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The Warden moves to dismiss on the ground that Petitioner has

procedurally defaulted this claim. Although Petitioner acknowledges that his claim is procedurally defaulted, he contends that the default should be excused. (Reply Gov't's Am. Mot. Dismiss and Summ. J. at 12). Upon a finding of cause and prejudice, the Magistrate Judge excused the procedural default, proceeded to the merits, concluded that there had been no *Miranda* violation, and recommended that the Warden's motion be granted. The Court agrees that the motion should be granted but does not reach the merits. Instead, the Court finds that Petitioner has not established a basis to excuse the procedural default.

Petitioner posits the constitutional ineffectiveness of counsel on direct appeal before the Tennessee Supreme Court as "cause" to excuse the procedural default of his *Miranda* claim. However, Petitioner acknowledges that that "cause" is itself procedurally defaulted -- just as it was when Petitioner presented ineffective assistance of appellate counsel as a claim instead of as "cause" to excuse the procedural default of another claim. Therefore, he is required to establish a basis to excuse the procedural default of the ineffective assistance of appellate counsel "cause" that (along with a showing of prejudice) would excuse the procedural default of his *Miranda* claim. *See Edwards*, 120 S. Ct. 1587 (a defaulted ineffective assistance of counsel claim can serve as "cause" to excuse the procedural default of another habeas claim if the petitioner can establish "cause and prejudice" for the default of the ineffective assistance claim). Again paralleling his claim for ineffective assistance of appellate counsel, Petitioner asserts the ineffective assistance of post-conviction counsel for that purpose. The Court rejects this argument for the same reasons that it did when it considered ineffective assistance of appellate counsel as a claim:

Coleman precludes it, and there is no constitutional right to counsel on a second appeal anyway.

7.

In his seventh claim for relief, Petitioner contends that the admission of his co-conspirator's hearsay statements at trial violated his constitutional right to confront his accusers. The Warden moves to dismiss on the ground that Petitioner has procedurally defaulted this claim. Although Petitioner acknowledges that his claim is procedurally defaulted, he contends that the default should be excused. (Reply Gov't's Am. Mot. Dismiss and Summ. J at 16). Upon a finding of cause and prejudice, the Magistrate Judge excused the procedural default, proceeded to the merits, agreed that Petitioner's Confrontation Clause rights had been violated, and indicated that the writ should be granted unless it was determined at a hearing that the error was harmless. The Court respectfully disagrees. Without reaching the merits, the Court concludes that Petitioner has not established a basis to excuse the procedural default.

Petitioner's basis to excuse the procedural default of his Confrontation Clause claim is the same one that he asserted to excuse the procedural default of his *Miranda* claim. He attempts to make a showing of "cause and prejudice" by proffering the ineffective assistance of counsel on direct appeal before the Tennessee Supreme Court as the "cause." However, the ineffective assistance of appellate counsel "cause" is itself procedurally defaulted, so Petitioner asserts the ineffective assistance of post-conviction counsel as "cause" to excuse that default. The Court rejects the argument for the same reasons as before:

Coleman precludes it, and there is no constitutional right to counsel on a second appeal anyway.

8.

In his eighth claim for relief, Petitioner contends in his Application for a Writ of Habeas Corpus and in the proceedings before the Magistrate Judge that the trial court had improperly ordered his sentences to run consecutively. The Warden moves to dismiss on the ground that the claim is procedurally defaulted. Upon a finding of cause and prejudice, the Magistrate Judge recommended that the procedural default be excused but concluded that whether sentences should run consecutively or concurrently is a matter of Tennessee law. Consequently, the Magistrate Judge found that the trial judge's decision rested upon an adequate and independent substantive state ground, which precludes federal habeas relief, *see, e.g.*, *Wainwright v. Sykes,* 433 U.S. 72, 81 (1977). In Petitioner's objections to the Report and Recommendation and Response to the Respondent's Objections (Docket Entry No. 32), Petitioner now acquiesces to the Magistrate Judge's reasoning and withdraws the claim. The state has never addressed the question of the existence of an adequate and independent state ground. Considering that Petitioner has withdrawn his claim that the trial judge improperly ordered his sentences to run consecutively, coupled with the state's silence, the Court considers the issue moot, and there is no need to consider it further.

9.

In his ninth claim for relief, Petitioner contends that this Court should grant a writ of habeas corpus because he

is "actually innocent" of the crimes charged. The Warden moves to dismiss on the ground that "actual innocense [sic]" is not a cognizable ground for habeas relief, *see Herrera v. Collins*, 506 U.S. 390 (1993), and that Petitioner has procedurally defaulted this claim. Although Petitioner acknowledges that his claim is procedurally defaulted, he contends that the default should be excused for cause and prejudice (Pet'r's Objs. R&R and Resp. Resp't's Objs. at 14) and to prevent a "fundamental miscarriage of justice" (Reply Gov't's Am. Mot. Dismiss and Summ. J. at 18). Although the Magistrate Judge did not address the Warden's contention that "actual innocense [sic]" is not a basis for habeas relief, the Magistrate Judge agreed with the Warden that the procedural default should not be excused. As an alternative holding, the Magistrate Judge recommended that the motion be granted because Petitioner has not made a showing of actual innocense [sic]. The Court agrees that the motion should be granted but does not reach the issue of procedural default or the merits. Instead, the Court agrees with the Warden that this claim is foreclosed by the Supreme Court's holding in *Herrera* that a freestanding claim of "actual innocense [sic]" may not serve as a basis for habeas relief. *Herrera* is directly on point, and no further discussion is warranted. *See also Sims v. United States,* No. 98-1228, 1999 WL 1000855, *2 (6th Cir. 1999).[5]

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[5] In considering whether Petitioner's procedural default on other issues should be excused, the Court has taken into account Petitioner's argument regarding "actual innocence" to determine whether he can establish "prejudice" or a "fundamental miscarriage of justice." In that context, Petitioner's contention that he is "actually innocent" is entirely appropriate. However, Petitioner has also styled "actual innocence" as a

(Continued on following page)

10.

In his tenth claim for relief, Petitioner contends that the evidence was insufficient to convict him as a matter of law. The Warden moves to dismiss on the ground that Petitioner has procedurally defaulted this claim. Although Petitioner acknowledges that his claim is procedurally defaulted, he contends that the default should be excused to prevent a "fundamental miscarriage of justice." (Reply Gov't's Am. Mot. Dismiss and Summ. J. at 16). The Magistrate Judge recommended that the Motion to Dismiss be granted both because Petitioner has not established a basis to excuse the procedural default and, in the alternative, because the evidence was sufficient to convict. The Court agrees with the Magistrate Judge but wishes to make its rationale clear.

Petitioner has an exceptionally high burden in establishing that his procedural default should be excused to prevent a "fundamental miscarriage of justice." Specifically, he must show that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). In other words, he "must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory

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freestanding claim, which *Herrera* precludes. The Supreme Court explained the distinction in *Schlup v. Delo*, 513 U.S. 298, 313-17 (1995).

scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Id.* at 324. The standard is met only in an "extraordinary case." *Id.* at 323 (citing *Carrier*, 477 U.S. at 496).

Petitioner has requested an evidentiary hearing to meet this standard, but he has not in any way stated what facts he intends to prove at such a hearing – much less presented to the Court any evidence that would create a genuine issue of material fact. Instead, without a scintilla of new evidence to support it, he simply makes the conclusory allegation that "the proof would show that Mr. Adams had no knowledge of his co-defendant's intent to rob the convenience store and Thomas Weser, nor did Mr. Adams take part in either incident." (Pet'r's Objs. R&R and Resp. Resp't's Objs. at 15). The Court is simply not permitted to conduct an evidentiary hearing under these circumstances. *See* 28 U.S.C. § 2253(e)(2).

However, in an abundance of caution, the Court has reviewed the entire trial record. Just as the Magistrate Judge found, the Court concludes that nothing in the record comes close to suggesting that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327.

It is worth noting, as did the Magistrate Judge, that even if Petitioner could demonstrate that his procedural default should be excused to prevent a "fundamental miscarriage of justice," he would still lose on the merits. As substantial as the burden of proof is in establishing a claim of "fundamental miscarriage of justice," it is even more formidable when Petitioner seeks to establish that the evidence was insufficient to convict. *See Jackson v.*

Virginia, 443 U.S. 307 (a court can grant a petition for habeas corpus on the basis of insufficient evidence only if no rational juror could have voted to convict).

IV.

Based on the foregoing reasons, the Court rules on Petitioner's ten claim as follows.

1.) Regarding Respondent's Motion for Summary Judgment on Petitioner's claim of ineffective assistance of counsel at trial, the Report is hereby ADOPTED AS MODIFIED, and the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion for Summary Judgment on this claim, and the claim is hereby DISMISSED.

2.) Regarding Respondent's Motion to Dismiss Petitioner's claim of ineffective assistance of counsel on direct appeal, the Report is hereby ADOPTED IN PART and REJECTED IN PART, and the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

3.) Regarding Respondent's Motion for Summary Judgment on Petitioner's claim of improper consolidation of indictments, the Report is hereby REJECTED, but the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion for Summary Judgment on this claim, and the claim is hereby DISMISSED.

4.) Regarding Respondent's Motion for Summary Judgment on Petitioner's claim that the trial court's jury instruction on reasonable doubt unconstitutionally lowered the prosecution's burden of proof, the Report

is hereby REJECTED, but the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion for Summary Judgment on this claim, and the claim is hereby DISMISSED.

5.) Regarding Respondent's Motion to Dismiss Petitioner's claim of ineffective assistance of counsel during post-conviction proceedings, the Report is hereby ADOPTED AS MODIFIED, and the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

6.) Regarding Respondent's Motion to Dismiss Petitioner's claim of a *Miranda* violation, the Report is hereby REJECTED, but the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

7.) Regarding Respondent's Motion to Dismiss Petitioner's claim that the admission of his co-conspirator's hearsay statements at trial violated his constitutional right to confront his accusers, the Report is hereby REJECTED, and the Recommendation that the motion be denied is also hereby REJECTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

8.) Regarding Respondent's Motion to Dismiss Petitioner's claim that the trial court improperly ordered Petitioner's sentences to run consecutively, both the Report and Recommendation that the motion be granted are hereby REJECTED AS MOOT because Petitioner has withdrawn the claim. Accordingly, the

Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

9.) Regarding Respondent's Motion to Dismiss Petitioner's claim of actual innocense [sic], the Report is hereby REJECTED, but the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

10.) Regarding Respondent's Motion to Dismiss Petitioner's claim of insufficient evidence, the Report is hereby ADOPTED AS MODIFIED, and the Recommendation that the motion be granted is hereby ADOPTED. Accordingly, the Court GRANTS Respondent's Motion to Dismiss this claim, and the claim is hereby DISMISSED.

Accordingly, Respondents Motion to Dismiss and for Summary Judgment is GRANTED as to all claims, Petitioner's Application for a Writ of Habeas Corpus is DENIED, and this case is hereby DISMISSED. Since Petitioner has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), a certificate of appealability shall not issue.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES
DISTRICT JUDGE

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2003 FED App. 0100P (6th Cir.)
File Name: 03a0100p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FRANK E. ADAMS, *Petitioner-Appellant,* v. FLORA J. HOLLAND, Warden, *Respondent-Appellee.*	No. 00-6575

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 99-00519 – Robert L. Echols, Chief District Judge.

Argued: September 11, 2002

Decided and Filed: April 4, 2003

Before: BOGGS and COLE, Circuit Judges; BATTANI, District Judge.*

COUNSEL

ARGUED: Paul R. Bottei, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Kim R. Helper, OFFICE OF THE ATTORNEY GENERAL,

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* The Honorable Marianne O. Battani, United States District Judge for the Eastern District of Michigan, sitting by designation.

CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee. **ON BRIEF:** Mariah A. Wooten, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Kim R. Helper, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee.

OPINION

BATTANI, District Judge. Before the court is Petitioner-Appellant Frank Adams's appeal from the denial of his habeas petition by the Middle District of Tennessee, Honorable District Court Judge Robert L. Echols. Appellant now preserves for appeal his claim for habeas relief based on the state trial court's admission of his co-defendant Timothy Crowell's hearsay testimony at trial, arguing that the admission of that statement violated Appellant's rights under the Confrontation Clause of the U.S. Constitution. Appellee argues that Appellant has procedurally defaulted his habeas challenge on this issue by failing to argue it in front of the Tennessee Supreme Court, and alternatively, that the admission of the co-defendant's statements did not violate Appellant's constitutional rights. Appellant now appeals the District Court's ruling that his habeas claim has been procedurally defaulted. We **AFFIRM**.

I. Factual Background

In February 1991, a jury in Davidson County, Tennessee, found Appellant guilty of the felony-murder of Thomas Weser and two counts of aggravated robbery, for which

Appellant was sentenced to life in prison plus twenty years. In October 1992, the Tennessee Court of Criminal Appeals affirmed those convictions. Appellant then applied for permission to appeal to the Tennessee Supreme Court, but did not specifically mention the Confrontation Clause issue before this court in that application, which was denied in June 1998.

In June 1999, Appellant filed his habeas petition before the District Court. The Magistrate Judge recommended that all of Appellant's habeas claims be dismissed except for his Confrontation Clause claim. The District Court agreed with the Magistrate Judge on all of the issues except for the Confrontation Clause issue; on the latter claim, the District Court found that Appellant had procedurally defaulted the claim by failing to bring it before the Tennessee Supreme Court in his application for permission to appeal. Appellant asked for a Certificate of Appealability from both the District Court and this court, and was denied both requests. He then filed a petition for Rehearing with this court on June 21, 2001. While this petition was pending, the Tennessee Supreme Court promulgated Tennessee Supreme Court Rule 39, which Appellant argues removes the procedural default assessed against his Confrontation Clause claim. Accordingly, on August 16, 2001, this court vacated the denial of Appellant's certificate of appealability, and granted a certificate on the following two issues: 1) whether, in light of Tennessee Supreme Court Rule 39, Appellant's Confrontation Clause claim is procedurally defaulted; and 2) if not, whether the admission of the co-defendant's statements violated Appellant's rights under the Confrontation Clause.

II. Discussion

This court reviews a district court's legal conclusions in a habeas proceeding de novo and its factual findings for clear error. *E.g., Miller v. Francis,* 269 F.3d 609, 613 (6th Cir. 2001).

A. Procedural Default

Appellant acknowledges that, were it not for Rule 39, his claim would be procedurally defaulted because review by a state supreme court is normally an "available state remedy" that must be exhausted before a federal habeas petition can be filed, even if the state supreme court has only discretionary appeals. *O'Sullivan v. Boerckel,* 526 U.S. 838, 847-48 (1999). Appellant concedes that he did not bring his Confrontation Clause issue before the Tennessee Supreme Court. Appellant argues, however, that in passing Rule 39, the Tennessee Supreme Court changed the landscape of exhaustion law in Tennessee. The rule reads in relevant part:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim.

Tenn. Sup. Ct. R. 39. Specifically, Appellant argues that Rule 39 removes review by the Tennessee Supreme Court as an "available state remedy" for any habeas claim after July 1, 1967, and that his Confrontation Clause issue has therefore not been procedurally defaulted by his failure to bring it before the Tennessee Supreme Court.

Appellee does not contest that Rule 39 purports to remove Tennessee Supreme Court review as an available state remedy for habeas purposes. Instead, Appellee argues that Rule 39 violates the Supremacy Clause of the U.S. Constitution because it conflicts with federal law as established in *O'Sullivan*. Appellee contends that, because discretionary review is still technically available in the Tennessee Supreme Court, *O'Sullivan* controls, and Rule 39 cannot displace federal law on the question of what counts as available state remedies. Appellee's alternative argument is that, even if Rule 39 did remove Tennessee Supreme Court review as an available state remedy, it did not do so "retroactively" and therefore Appellant's habeas claim is still procedurally defaulted. Specifically, Rule 39 was promulgated after Appellant's habeas petition had been submitted, and was promulgated even after Appellant had applied for a rehearing on the denial of his certificate of appealability. Appellee maintains that Rule 39, at most, removed Tennessee Supreme Court review for habeas petitions brought after its promulgation, and that Appellant's habeas claim therefore remains procedurally defaulted.

1. Rule 39 has made Tennessee Supreme Court review "unavailable"

The Supreme Court has recently held that even discretionary appeals by a state supreme court are

available state remedies that must be exhausted for habeas relief. *O'Sullivan,* 526 U.S. at 847-48. The *O'Sullivan* Court, however, explicitly excepted from its holding cases in which the state has explicitly disavowed state supreme court review as an "available state remedy." *Id.* at 847. In this regard, the Supreme Court stated that "we note that nothing in our decision today requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable." *Id.* The Supreme Court recognized that federal law does not prohibit a state from deciding for itself the availability of a particular state remedy. "The exhaustion doctrine, in other words, turns on an inquiry into what procedures are 'available' under state law . . . there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available." *Id.* at 847-48. Rule 39 clearly removed Tennessee Supreme Court review as an antecedent for habeas purposes. By its terms, Rule 39 dictates that once the Court of Criminal Appeals has denied a claim of error, "the litigant shall be deemed to have exhausted all available state remedies available for that claim." Tenn. Sup. Ct. R. 39.

Appellee argues that Rule 39 has not technically made Tennessee Supreme Court review *unavailable,* however, since litigants have not been explicitly prohibited from appealing to the state supreme court. According to Appellee, Rule 39 would only have made Tennessee Supreme Court review "unavailable" if it had used explicit statements such as "a litigant shall hereby not be allowed to petition this Court for review," or "this Court will no longer, under any circumstances, review decisions of the Court of Criminal Appeals rejecting claims of error." Appellee's argument, however, fails to grasp the meaning

of the word "available" as it is used in *O'Sullivan,* and instead dwells upon a hypertechnical interpretation of that term. Appellee's misinterpretation is revealed by the *O'Sullivan* Court's examples of what might constitute making state supreme court review unavailable: namely, rules passed by the Supreme Courts of South Carolina and Arizona. *O'Sullivan,* 526 U.S. at 847. Although the *O'Sullivan* majority declined to rule definitively on whether those rules would change the law on exhaustion and procedural default, it did recognize that the rules were trying to make state supreme court review unavailable in those states for habeas purposes. *Id.* The South Carolina Supreme Court, for example, declared:

> We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for writ of certiorari upon the Court of Appeals' denial of relief in order to exhaust all available state remedies. We therefore declare that in all appeals from criminal convictions or post-conviction relief matters, *a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies.*

In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 321 S.C. 563, 564 (1990) (emphasis added) (footnote omitted). The *O'Sullivan* Court considered this South Carolina rule as trying to remove South Carolina Supreme Court review as an available state

remedy for habeas purposes, but reserved judgment as to whether the rule actually succeeded in doing so. *O'Sullivan,* 526 U.S. at 847-48.

It is worth noting that the highlighted language is essentially identical to that in Rule 39. Specifically, neither rule completely removes state supreme court review as an option for litigants; indeed, the South Carolina rule explicitly allows for the presentation of the claim to its Supreme Court. Both rules, however, establish that Supreme Court review is no longer part of the normal course of review for criminal appeals, and is not necessary for exhaustion of "all available state remedies." *See also State v. Sandon,* 161 Ariz. 157, 158 (1989) ("Once the defendant has been given the appeal to which he has a right [i.e., in the Court of Appeals], state remedies have been exhausted") (internal quotations omitted). The *O'Sullivan* Court pointed out that, contrary to Appellee's assertions, technically available remedies are still not "available" for habeas purposes when "those remedies are alternatives to the standard review process." *O'Sullivan,* 526 U.S. at 844 (citing *Wilwording v. Swenson,* 404 U.S. 249, 249-50 (1971)). Instead, when remedies are taken outside of the normal criminal review process, those remedies become "extraordinary:" technically available to the litigant but not required to be exhausted. *Id.*

Our view of the *O'Sullivan* opinion is bolstered by the concurring opinion of Justice Souter from that case. First, Justice Souter, who joined the majority, also cited the South Carolina rule as an example of a state making its Supreme Court review an "unavailable" state remedy, and echoed the majority opinion's citation of *Wilwording. O'Sullivan,* 526 U.S. at 849-50. Justice Souter made two further crucial observations about the majority opinion.

First, Justice Souter explained that under the majority opinion, a state supreme court did not have to "be subjected to constant applications for a form of discretionary review that the State wishes to reserve for truly extraordinary cases, or else be forced to eliminate that kind of discretionary review." *Id.* at 850. In other words, again contrary to Appellee's argument, a state supreme court can preserve discretionary review of criminal appeals while still dictating that review to be "unavailable" for habeas purposes. Second, Justice Souter stated his understanding "that we leave open the possibility that a state prisoner is likewise free to skip a procedure even when a state court has occasionally employed it to provide relief, so long as the State has identified the procedure as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion." *Id.*

Thus, the majority and concurring opinions from *O'Sullivan* lead us to believe that Rule 39 rendered Tennessee Supreme Court review "unavailable" in the context of habeas relief. Moreover, the language quoted above from *O'Sullivan* also indicates that this decision by the Tennessee Supreme Court does not violate the Supremacy Clause. A state law or rule violates the Supremacy Clause only if it explicitly conflicts with federal law. *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 663 (1993); *accord Southeastern Oakland County Res. Recovery Auth. v. City of Madison Heights,* 5 F.3d 166, 168 (6th Cir. 1993). As quoted above, the Supreme Court has not yet explicitly decided whether a rule like Rule 39 would remove state supreme court review for habeas purposes. *O'Sullivan,* 526 U.S. at 847-49. This statement alone shows that there is no "actual conflict" between Rule 39 and federal law. Even beyond this, however, the language quoted above from

O'Sullivan clearly shows the Supreme Court's view that the question of what constitutes the body of "available state remedies" is one of state law, not one of federal law: "there is *nothing* in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available . . . " *Id.* (emphasis added).

Finally, it should be pointed out that *every* other lower court that has considered, post-*O'Sullivan,* the effect of a rule like Rule 39 has held that such a rule permissibly eliminates state supreme court review as an available state remedy that must be exhausted. The Ninth Circuit found that *O'Sullivan* implicitly overruled its earlier position that Arizona could not remove state supreme court review as an available state remedy to be exhausted. *Swoopes v. Sublett,* 196 F.3d 1008, 1009-11 (9th Cir. 1999). Similarly, the Eighth Circuit held that a Missouri rule clearly stated its intent to place state supreme court review outside the set of available state remedies preceding habeas relief. *Randolph v. Kemna,* 276 F.3d 401, 404 (8th Cir. 2002); *see also Mattis v. Vaughn,* 128 F.Supp.2d 249, 256-61 (E.D. Pa. 2001). Appellee's attempt to rely on *Rodriguez v. Scillia,* 193 F.3d 913, 917 (7th Cir. 1999), is unsuccessful because Illinois has a discretionary appeal system *without* a rule like the one passed in Arizona, Pennsylvania, Missouri or Tennessee, and so *O'Sullivan* still applies there.

2. Rule 39 does not operate retroactively to prevent procedural default by Appellant in this case

A closer question is presented as to whether Rule 39 applies "retroactively" to Appellant's case in particular. Two Circuit Courts have considered whether a rule like

Rule 39 can apply to habeas petitions filed before their promulgation, and have come to opposite conclusions. Dealing with the Missouri rule, the Eighth Circuit rejected the State's argument that "because the amendment to Rule 83.04 has an effective date of July 1, 2002, its invocation" did not help the petitioner, who filed for habeas relief before that date. *Randolph,* 276 F.3d at 404. The Eighth Circuit based its conclusion on the Rule's language, which indicated that it was not changing Missouri law to exclude state supreme court review as an available remedy, but rather was clarifying what had already been Missouri law. *Id.* "The order recites that 'In order to state the existing law in Missouri, the Court notes that transfer of a case . . . to this Court . . . is not part of the standard review process for the purposes of federal habeas corpus review.'" *Id.* The *Randolph* court reasoned that because the announcement of the Missouri rule purported to clarify the existing law, rather than change it, the rule had applied when the petitioner had filed for habeas relief, and so was not even being applied retroactively in that case. *Id.*

On the other hand, the Third Circuit refused to apply the Pennsylvania rule, passed in May 2000, to remove the procedural default from a habeas petition filed before that date. *Wenger v. Frank,* 266 F.3d 218, 225-226 (3rd Cir. 2001). The Third Circuit based its conclusion largely on textual considerations. First, it looked to the language of the Pennsylvania rule, which announced, "AND NOW, this 9th day of May, 2000 . . . we hereby declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing or allowance of appeal . . . in order to be deemed to have exhausted all available state remedies . . . This Order shall be effective immediately." *Id.* at 224-25

(internal quotations omitted). The Third Circuit found that language to allow application of the rule only on or after May 9, 2000, because it announced that it would be "effective immediately," not as of some prior date. *Id.* at 225. Based on that same language, the *Wenger* court also found that the Pennsylvania rule had amended Pennsylvania law, and that prior to its passage, state supreme court review had been an available state remedy in Pennsylvania. *Id.* at 226. This, of course, stands in contrast to the language of the Missouri rule, which established that it was clarifying existing law rather than creating different law on the subject.

Superficially, the instant case seems more similar to the one in *Randolph* than in *Wenger* because Rule 39 announced its applicability to "all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967." Tenn. Sup. Ct. R. 39. However, Rule 39 does not state clearly that it is merely elucidating existing Tennessee law, unlike the Missouri rule, which stated explicitly that it only clarified Missouri law. Indeed, federal courts interpreting Tennessee law have, until the passage of Rule 39, always required appeal to the Tennessee Supreme Court as part of the habeas exhaustion requirement, revealing that Rule 39 *changed* Tennessee law rather than merely clarifying it. *E.g., Stubbs v. Bomar,* 321 F.2d 535, 536 (6th Cir. 1963); *Jones v. Jones,* 76 F.Supp.2d 850, 856-57 (E.D. Tenn. 1999); *Abdur'Rahman v. Bell,* 999 F.Supp. 1073, 1080 (M.D. Tenn. 1998), *vacated on other grounds by* 226 F.3d 696 (6th Cir. 2000); *Cole v. Campbell,* 703 F.Supp. 657, 659 (M.D. Tenn. 1988); *Layman v. Russell,* 300 F.Supp. 430, 431 (E.D. Tenn. 1969). In other words, prior to Rule 39, the law of Tennessee was apparently that Tennessee Supreme Court review was an

available remedy, so unlike the Missouri rule, Rule 39 should not be applied retroactively.

The Third Circuit invoked policy considerations to bolster its textual conclusion, surmising that allowing retroactive application of the Pennsylvania rule would not serve the rule's purpose of easing the burden on the state supreme court's docket because the state supreme court had already passed on those petitions filed before the rule. *Id.* at 225-26 (citing *Mattis,* 128 F.Supp.2d at 262). Thus, the rule would merely serve to burden the federal courts with erstwhile dormant habeas cases, without providing any corresponding benefit to the state court system. *Mattis,* 128 F.Supp.2d at 262. The *Wenger*/*Mattis* policy arguments against retroactive application are as persuasive to this court as the textual arguments. Rules like Rule 39 allow state supreme courts to lessen their workload by largely avoiding the onslaught of criminal appeals. Applying Rule 39 *retroactively,* however, does not help to lessen any burden on the Tennessee Supreme Court because the cases that would be reached by retroactive application are not threats to burden the Tennessee Supreme Court's docket. For example, Appellant's case here cannot be placed back in front of the Tennessee Supreme Court, so application of Rule 39 to his case would not result in any efficiency gain such as that envisioned by the *O'Sullivan* Court. Instead, retroactive application simply threatens to burden federal courts with long-dormant habeas cases, with no corresponding benefit to the state court systems. *Wenger,* 266 F.3d at 225-26; *Mattis,* 128 F.Supp.2d at 262. In short, this court does not apply Rule 39 retroactively to Appellant's case, and therefore finds that his Confrontation Clause claim is procedurally defaulted.

B. The Confrontation Clause claim

Also before the court are Appellant's Confrontation Clause claim and his request that the court add the transcript of the closing arguments to the appellate record when considering that claim. Because we hold that Appellant's Confrontation Clause issue is procedurally defaulted, we do not reach these other two issues.

III. Conclusion

For the reasons stated above, we AFFIRM the judgment of the District Court denying Appellant's habeas petition.

No. 00-6575

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK E. ADAMS, Petitioner-Appellant, v. FLORA J. HOLLAND, Warden, Respondent-Appellee.	)	ORDER (Filed Jun. 7, 2001)

Before: MARTIN, Chief Judge.

Frank E. Adams, a Tennessee prisoner, appeals a district court order dismissing his petition for a writ of habeas corpus. *See* 28 U.S.C. § 2254. He has applied for a certificate of appealability. *See* Fed. R. App. P. 22(b)(1).

The application for a certificate of appealability is denied because Adams has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253 (c)(2).

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

No. 00-6575

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK E. ADAMS, Petitioner-Appellant, v. FLORA J. HOLLAND, Warden, Respondent-Appellee.	)	ORDER (Filed Aug. 16, 2001)

Before: NORRIS, MOORE, and COLE, Circuit Judges.

Petitioner-Appellant Frank E. Adams has filed a petition for rehearing of this court's order of June 7, 2001, which denied Adams a certificate of appealability to appeal the district court's dismissal of his habeas corpus petition. *See* 28 U.S.C. § 2254.

Upon careful consideration, this panel grants the petition for rehearing and vacates the court's prior order. The panel grants Adams a certificate of appealability on the following issues: (1) whether, in light of Tennessee Supreme Court Rule 39, as amended June 28, 2001, Adams procedurally defaulted claim (7); and (2) if not, whether the trial court's admission of the statement by Adams' co-defendant violated his Fifth Amendment right of confrontation. Adams's application for a certificate of appealability is denied as to all other claims.

The clerk is directed to establish a briefing schedule.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

No. 00-6575

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK E. ADAMS, Petitioner-Appellant, v. FLORA J. HOLLAND, WARDEN, Respondent-Appellee.	)	ORDER (Filed Aug. 27, 2003)

BEFORE: BOGGS and COLE, Circuit Judges; and BATTANI, * District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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* Hon. Marianne O. Battani, United States District Judge for the Eastern District of Michigan, sitting by designation.

UNITED STATES CODE

TITLE 28

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

. . .

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

. . .

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: ORDER ESTABLISHING RULE 39, RULES OF THE SUPREME COURT OF TENNESSEE: EXHAUSTION OF REMEDIES

(Filed June 28, 2001)

ORDER

In 1967, the General Assembly created the Tennessee Court of Criminal Appeals in order to reduce the appellate backlog in criminal cases. In most criminal and post-conviction cases, review of a final order of the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion. Permission to appeal will be granted by this Court only where special and important reasons justify the exercise of that discretionary review power. Tenn. R. App. Proc. 11. We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. In order to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes, we hereby adopt the following Rule 39, Rules of the Supreme Court, as stated below.

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting

a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

FOR THE COURT:

/s/ Riley Anderson
Riley Anderson, Chief Justice